Supreme Court, U.S.
FILED
MAR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,

and

NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF *AMICI CURIAE* OF CONSOLIDATED RAIL CORPORATION, CRUCIBLE MATERIALS CORPORATION, FERRO CORPORATION, JERSEY CENTRAL POWER & LIGHT COMPANY, MCDERMOTT INCORPORATED, MURPHY OIL USA, INC., PENNSYLVANIA ELECTRIC COMPANY, POWELL DUFFRYN TERMINALS, INC., SHELL OIL COMPANY, AND UNIVERSAL TOOL & STAMPING CO., INC. IN SUPPORT OF PETITIONER

SCOTT M. DUBOFF *
MCNEILL WATKINS II
JOHN P. PROCTOR
BISHOP, LIBERMAN, COOK,
PURCELL & REYNOLDS
1200 Seventeenth St., N.W.
Washington, D.C. 20036
Phone: (202) 857-9800
Counsel for *Amici Curiae*

* Counsel of Record

(Additional Counsel Listed on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

Of Counsel:

JOHN R. JENCHURA
Consolidated Rail Corporation
1138 Six Penn Center Plaza
Philadelphia, PA 19103
Counsel for Consolidated Rail Corporation

PHILLIP CONTRERAS
Ferro Corporation
One Erieview Plaza
Cleveland, Ohio 44114
Counsel for Ferro Corporation

RICHARD S. COHEN
Jersey Central Power & Light Company
Box 1279R
Morristown, New Jersey 07960
Counsel for Jersey Central Power & Light Company

JACK M. ARNOLD
McDermott Incorporated
1010 Common St., Suite 2745
New Orleans, LA 70112
Counsel for McDermott Incorporated

JAMES E. BAINE
Murphy Oil USA, Inc.
Murphy Building
200 Peach Street
El Dorado, Arkansas 71730
Counsel for Murphy Oil USA, Inc.

TIMOTHY N. ATHERTON
Pennsylvania Electric Company
1001 Broad Street
Johnstown, PA 15907
Counsel for Pennsylvania Electric Company

NATHAN M. EDELSTEIN
EDELSTEIN & BERNSTEIN
3131 Princeton Pike
Lawrenceville, NJ 08648
Counsel for Powell Duffryn Terminals, Inc.

JOSE A. BERLANGA
Shell Oil Company
P.O. Box 2463
Houston, Texas 77001
Counsel for Shell Oil Company

GRANT VAN HORNE
112 South Cedar Street
Auburn, Indiana 46706
Counsel for Universal Tool & Stamping Co., Inc.

TABLE OF CONTENTS

	Page
Statement of Interest of Amici	2
Summary Of Argument	3
Argument	4
A. Section 505 Does Not Authorize Citizen Suits To Impose Penalties For Past, Nonrecurring Violations	4
B. Jurisdiction Under Section 505 Requires A Showing That Violations Are Ongoing, And Jurisdiction Is Not Established Merely On The Basis Of An Allegation That Continuing Violations Are Likely	11
Conclusion	14

TABLE OF AUTHORITIES

Cases

Chrysler Corp. v. Brown, 441 U.S. 281 (1980)	8
City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979)	9
Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980)	8
Deutsch v. Hewes Street Realty Corp., 359 F.2d 96 (2nd Cir. 1966)	12
Environmental Protection Agency v. California ex rel. State Water Resources Control Board, 426 U.S. 200 (1976)	2
Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57 (2d Cir. 1985)	13
Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392 (5th Cir. 1985)	9, 11, 12
International Paper Co. v. Ouellette, 107 S.Ct. 805 (1987)	5
Marathon Oil Co. v. Environmental Protection Agency, 564 F.2d 1253 (9th Cir. 1977)	13
Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981)	5, 9

TABLE OF AUTHORITIES—Continued

	Page
O'Shea v. Littleton, 414 U.S. 488 (1974)	12
Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., 807 F.2d 1089 (1st Cir. 1986)	5, 9, 11, 12, 13
Sierra Club v. Kerr-McGee Corp., 23 Env't Rep. Cas. (BNA) 1685 (W.D. La. 1985)	13
Statutes	
33 U.S.C. § 1318	2, 12
33 U.S.C. § 1319	4, 8, 9, 10, 13
33 U.S.C. § 1342	2
33 U.S.C. § 1365	*passim*
42 U.S.C. § 7604	5, 6, 7, 12
Water Quality Act of 1987, Pub. L. No. 100-4, § 313, 101 Stat. 7	13
Legislative Material	
H.R. Rep. No. 911, 92d Cong., 2d Sess. (1972)	6
H.R. Rep. No. 1783, 91st Cong., 2d Sess. (1970)	7
S. Rep. No. 414, 92d Cong., 1st Sess. (1971)	6, 7
S. Rep. No. 1196, 91st Cong., 2d Sess. (1970)	6
A Legislative History of the Water Pollution Control Act Amendments of 1972, Senate Comm. on Public Works, 93d Cong., 1st Sess. (1973)	6
A Legislative History of the Clean Air Act Amendments of 1970, Senate Comm. on Public Works, 93d Cong., 2d Sess. (1974)	6, 7
Water Pollution Control Legislation: Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 92d Cong., 1st Sess. (1971)	6, 7
116 Cong. Rec. 32927 (1970)	7
Other Authority	
Fed. R. Civ. P. 11	12
2A C. Sands, Sutherland on Statutory Construction § 53.01 (4th ed. 1973)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-473

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,

and

NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF *AMICI CURIAE* OF CONSOLIDATED RAIL CORPORATION, CRUCIBLE MATERIALS CORPORATION, FERRO CORPORATION, JERSEY CENTRAL POWER & LIGHT COMPANY, MCDERMOTT INCORPORATED, MURPHY OIL USA, INC., PENNSYLVANIA ELECTRIC COMPANY, POWELL DUFFRYN TERMINALS, INC., SHELL OIL COMPANY, AND UNIVERSAL TOOL & STAMPING CO., INC. IN SUPPORT OF PETITIONER

This brief *amici curiae* is submitted in support of petitioner Gwaltney of Smithfield, Ltd. *Amici* believe that

the decision below of the court of appeals, *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, incorrectly interprets section 505 of the Federal Water Pollution Control Act, 33 U.S.C. § 1365 ("the Clean Water Act" or "the Act"), as authorizing citizen suits seeking penalties for purely past violations of the Act.

The petitioner and respondents have consented to the filing of this brief. Their letters of consent have been filed with the Court.

STATEMENT OF INTEREST OF AMICI

Amici represent a broad spectrum of U.S. industry, including chemical production, oil exploration, production, refining and marketing, electric utilities, railroad freight transportation, production of steel and other metal products, ocean tanker terminals, and tool manufacturing. Like petitioner, each of the *amici* holds one or more permits issued under the National Pollutant Discharge Elimination System ("NPDES") established by section 402 of the Clean Water Act, 33 U.S.C. § 1342. These permits regulate the discharge of pollutants to navigable waters.[1]

---

[1] The 1972 amendments to the Act required the establishment on an industry by industry basis of generally applicable effluent limitations that restrict the types, quantities and concentrations of pollutants that may be discharged. These effluent limitations are enforced through individual NPDES permits which transform the generally applicable effluent limitations into obligations of a discharger. *See Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 203-08 (1976). Each such permit limitation or standard is referred to as a "parameter" (*e.g.*, specific limits for chemicals, metals, heat, etc., contained in the discharge). Section 308 of the Act, 33 U.S.C. § 1318, requires the permittee to monitor each parameter at a specified interval. Monitoring reports are submitted to the appropriate regional office of the U.S. Environmental Protection Agency and the state environmental protection office, who use the reports in evaluating compliance and determining whether enforcement action is necessary. In addition, all monitoring reports are available to the public.

On a composite basis *amici* hold 97 NPDES permits for facilities in 23 states.

Amici are committed to the goals of the Clean Water Act. To that end, and in coordination with state and federal regulatory authorities, *amici* have spent more than $156 million during the past five years to upgrade and enhance water pollution control at these facilities. Nevertheless, each *amici* is either a current defendant in one or more citizen enforcement suits under section 505 of the Clean Water Act, a defendant in a recently concluded suit under section 505 or has received notice, pursuant to section 505(b)(1)(A), that an environmental organization intends to file such a suit. A number of these actions involve the issue presently before the Court —whether section 505 authorizes suits to impose penalties for purely past violations of the subject facility's NPDES permit. The decision below, therefore, directly affects *amici* and raises fundamental questions regarding the role Congress intended for citizen suits under section 505.

SUMMARY OF ARGUMENT

Section 505's purpose is abatement of ongoing violations of the Clean Water Act. The statute authorizes a citizen suit against a person "alleged to be in violation" of its obligations under the Act, and where it is shown that a person is in violation, unlawful conduct may be enjoined and a civil penalty imposed. Conversely, a suit may not be brought under section 505 to impose punishment for purely past violations.

The terms of section 505 and its legislative history confirm this interpretation. They repeatedly focus on the present tense, that is, persons who are currently violating the Act and for whom an order requiring compliance is necessary. Similarly, section 505's legislative history emphasizes that abatement is the intended purpose of a citizen suit. On the other hand, neither the statute nor

its legislative history support the view of the court of appeals below that a citizen suit may be brought solely to impose civil penalties for previously abated violations. In reaching that conclusion the court disregarded contrary legislative history. Instead, the court made a superficial comparison of section 505 to section 309, 33 U.S.C. by 1319, the Act's provision authorizing government enforcement. The court reasoned that under section 309 the federal government may sue for penalties for purely past violations and citizens should have the same authority. That reasoning is flawed. Section 505 does not duplicate government enforcement and looks to the future rather than to matters that are over and done with. This reflects the fact that the object of section 505, like the policy underlying the Clean Water Act, is abatement of ongoing pollution.

ARGUMENT

A. Section 505 Does Not Authorize Citizen Suits To Impose Penalties For Past, Nonrecurring Violations

The court of appeals ruled that section 505(a) authorizes citizen suits for NPDES permit violations committed entirely in the past. By the court of appeals' own admission, its interpretation is "expansive." 791 F.2d at 311-12. The court's position is also contrary to the other circuits that have addressed the same issue.

The court of appeals approached this statutory interpretation issue in terms of establishing the court's view of a reasonable policy for citizen suits, *id.* at 309-11, rather than discerning Congress' intent regarding the role of citizen suits under section 505. Congress, however, did not intend section 505 to duplicate government enforcement or as punishment for past violations, in the form of civil penalties, without a current environmental compliance benefit. The court of appeals' decision disregards that intent and the decision's impact is severe. Persons who achieve permit compliance before the filing

of a suit under section 505 remain subject to citizen suits for substantial civil penalties. That extends citizen suits beyond the purpose Congress specified in the Clean Water Act. The result will be unnecessary litigation without benefit to the environment.

1. Section 505(a) of the Clean Water Act authorizes a citizen suit against a person "alleged to be in violation" of its obligations under the Act. The statute focuses on abatement of ongoing violations, that is, persons who are "in violation" of an effluent standard or limitation for whom an order "to require compliance" is necessary. *See* §§ 505(a) and (b); *International Paper Co. v. Ouellette*, 107 S.Ct. 805, 815 n.18 (1987) (where a person "is violating the terms of its permit," a citizen may sue under section 505 "to compel compliance"). Similarly, the "in violation" proviso is the condition precedent both to an order to enforce an effluent standard or limitation *and* the payment of a civil penalty.

This language clearly demonstrates section 505's purpose as an injunction statute for abatement of ongoing violations. It was "expressly modeled" after the citizen suit provision in section 304 of the Clean Air Act, 42 U.S.C. § 7604. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 17 n.27 (1981). Like section 505(a), section 304(a) of the Clean Air Act authorizes injunctive relief against persons "alleged to be in violation" of statutory obligations. Under each of the statutes the court can issue an enforcement order or injunction. Under section 505(a), the court may supplement its injunction order with civil penalties ("the district courts shall have jurisdiction . . . to enforce such an effluent standard or limitation . . . and to apply any appropriate civil penalties"). Thus, although section 505 adds civil penalties to the injunctive relief available under section 304, section 505 reflects no change in purpose from section 304. *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1092-93 (1st Cir. 1986).

The court of appeals, however, dismissed section 304 of the Clean Air Act as irrelevant to interpretation of section 505. In a brief footnote the court of appeals suggested that the Clean Air Act and its legislative history are completely inapposite here because section 304 permits only injunction suits. 791 F.2d at 311 n.12. That reasoning contradicts this Court's recognition that section 505 was expressly modeled after section 304, and ignores section 505's legislative history, which states that section 505 is "carefully restricted" to the same types of actions as section 304. *See* S. Rep. No. 414, 92d Cong., 1st Sess. 79 (1971), *reprinted in* 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972* ("CWA Leg. Hist.") 1497 (1973).[2] Specifically, both statutes authorize abatement actions, that is, actions to terminate ongoing violations. "Successful abatement" is the intended "result of a citizen proceeding." S. Rep. No. 414, *supra* at 81, 2 CWA Leg. Hist. at 1499.[3]

The court of appeals dismissed this legislative history as insignificant, observing that such statements do not show that abatement is section 505's only purpose. 791 F.2d at 311. That once again disregards the fact that the legislative history of section 304 of the Clean Air Act, which is solely an injunction statute, is identical to the legislative history of section 505 of the Clean Water Act. *See* S. Rep. No. 1196, 91st Cong., 2d Sess. 37 (1970), *reprinted in* 1 *A Legislative History of the Clean Air Act Amendments of 1970* ("CAA Leg. Hist.")

---

[2] *See also* H.R. Rep. No. 911, 92d Cong., 2d Sess. 133 (1972), 1 CWA Leg. Hist. at 820 (section 505 "closely follows" the concepts of section 304 but adds civil penalties as well as injunctive relief).

[3] *See also* H.R. Rep. No. 911, *supra* at 133, 2 CWA Leg. Hist. at 820 (suits under section 505 are abatement actions). Similarly, a citizen suit may be brought "to abate a violation" of the Act and to "seek compliance." *Water Pollution Control Legislation: Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 1st Sess. 109, 114 (1971).

437 (1974) (under section 304, if government does not initiate "abatement proceedings . . . , the citizen might choose to file the action").[4] If section 505 had been intended to authorize, in addition to abatement actions, suits to impose penalties for purely past violations, then surely such a distinction between sections 304 and 505 would be clear in the latter provision's language and legislative history. Instead, the legislative history underlying each of the two statutes uses the following identical statement to describe them:

> The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances[,] the courts should award costs of litigation to such party. This should extend to plaintiffs in actions *which result in such successful abatement* but do not reach a verdict. For instance, *if as a result* of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions [emphasis supplied].

S. Rep. No. 414, *supra* at 81, 2 CWA Leg. Hist. at 1499; 116 Cong. Rec. 32927 (1970) (Sen. Muskie), 1 CAA Leg. Hist. at 136.

In Congress' words, the fundamental object of a citizen suit under either the Clean Water Act or the Clean Air Act is to bring about "a result"—abatement of ongoing violations—and the court of appeals erred in ascribing significantly different meanings to these parallel statutes. Had Congress intended to authorize suits under section 505 solely to impose penalties, then Congress would not have repeatedly described sections 304 and 505 as authorizing the same type of abatement actions. This legislative history provides sound evidence that Congress

---

[4] *See also* H.R. Rep. No. 1783, 91st Cong., 2d Sess. 55 (1970), 1 CAA Leg. Hist. 205 (citizen suits are authorized to seek abatement of violations).

did not intend that section 505 suits would be filed to collect civil penalties for violations that had abated prior to suit.[5]

2. The court of appeals minimized the importance of section 505's emphasis on current, ongoing violations, as well as the legislative history showing the statute's purpose as a mechanism for seeking abatement of such violations. Instead, the court focused on section 309 of the Clean Water Act, 33 U.S.C. § 1319, which authorizes government enforcement, and compared that provision to section 505. The court found the language of the two provisions similar and concluded that the federal government has authority under section 309 to seek penalties for purely past violations. With those premises, the court concluded that citizens should have equivalent enforcement authority. The court's reasoning is flawed.

First, the Act specifies significantly different enforcement roles for the government and private plaintiffs. Section 309 places primary responsibility for Clean Water Act enforcement with the federal government and

---

[5] *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (because substantive provisions of Age Discrimination in Employment Act were derived *in haec verba* from equal employment opportunity sections of Civil Rights Act of 1964, interpretation of Civil Rights Act applies with equal force in context of age discrimination). *See also* 2A C. Sands, *Sutherland on Statutory Construction* § 53.01 at 549 (4th ed. 1973).

Respondents subordinate this legislative history to a written statement by Senator Muskie that a citizen suit may be brought against one "alleged to be, or to have been, in violation." 118 Cong. Rec. 33700 (1972), 1 CWA Leg. Hist. at 179. As petitioner's brief explains (pp. 28-29), that statement was not considered by other legislators. Moreover, an isolated statement of a single legislator, albeit a sponsor of the legislation, is not controlling in analyzing legislative history. *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980). It must be considered together with the other legislative history, *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979), which in this case refutes the court of appeals' interpretation.

states having adequate authority under their own laws to enforce the Act. In comparison to government's "central" enforcement responsibility, the role of citizen suits is of a "limited nature" that only "supplement[s]" government. *Middlesex County*, 453 U.S. at 13-14, 17 n.27. In other words, contrary to the court of appeals, section 505 "does not permit the citizen to *duplicate* the [government's enforcement] powers." *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392, 395 (5th Cir. 1985). For that reason, section 505 does not authorize suits for purely past violations of the Act. *Id.*; *see also City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1014 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980).

The limited role intended for citizen enforcement is corroborated by the sixty-day notice requirement in section 505(b). A citizen suit is barred where, in response to a section 505(b) notice, the government brings an action "to require compliance." As explained in *Hamker v. Diamond Shamrock*, 756 F.2d at 396:

> [I]t is most reasonable to read the [§ 505(b)] requirement that notice also be given to the alleged violator as an indication that where the violator responds to the notice by bringing himself into compliance, the citizen loses the right to bring suit under 1365(a) [§ 505(a)], just as he loses the right to commence an action where the Administrator [of the EPA] or the state responds by diligently prosecuting an action against the alleged violation . . . [citations omitted].

The court of appeals' contrary position also fails to recognize important differences in the language of sections 309 and 505. As indicated above, in section 505 "there is no retreat from the present tense." *Pawtuxet Cove*, 807 F.2d at 1092. Consistent with the statute's focus on the present, it is directed against a person who is "in violation" and for whom an order "to require

compliance" is necessary. *See* §§ 505(a) and (b). Moreover, "in violation" is a prerequisite both to enforcement orders and civil penalty relief. Similarly, a condition precedent to a section 505 suit is that the plaintiff give notice "to the state in which the alleged violation *occurs*," and the plaintiff must be a person whose interest "*is or may be* adversely affected." *See* §§ 505(b)(1)(A)(ii) and 505(g) (emphasis supplied).

In contrast, in section 309 the term "in violation" is confined to subsection 309(a). That provision authorizes administrative compliance orders based on a finding that the permittee is "in violation" of an effluent limitation, etc., and prior issuance of such a finding under subsection 309(a) is also the predicate for a civil action by the government under subsection 309(b). But the "in violation" provision is otherwise absent from section 309.[6] Thus, assuming that section 309 authorizes a government-initiated civil penalty suit for purely past violations, the significant differences between that provision and section 505 demonstrate that the latter limits citizen suit jurisdiction to ongoing violations.

In short, the court of appeals' decision contradicts the terms of section 505 and its underlying policy. Congress did not establish section 505 to duplicate government enforcement or to impose punishment, without any current compliance benefit, on persons who failed to comply fully in the past. For that reason, section 505 looks to the future, rather than to matters that are over and done with. This reflects the fact that the object of section 505, like the policy of the Clean Water Act, is abatement of pollution.

---

[6] Unlike § 505(a)'s "in violation" condition precedent to civil penalties in a citizen suit, section 309 authorizes civil penalties against anyone who "violates" the Act or a previously issued administrative order under § 309(a).

B. Jurisdiction Under Section 505 Requires A Showing That Violations Are Ongoing, And Jurisdiction Is Not Established Merely On The Basis Of An Allegation That Continuing Violations Are Likely

Noting that subsection 505(a) confers jurisdiction where a person is "alleged to be in violation," the court of appeals implied that a possible alternative basis for decision here is that the respondents' complaint alleged in good faith that petitioner's violations would continue. But the court ruled that section 505 jurisdiction extends to purely past violations, making it unnecessary to consider the question of continuing violations. 791 F.2d at 308 n.9.

The First Circuit's recent *Pawtuxet Cove* decision is in part similar to that aspect of the decision below. On the one hand, the First Circuit agreed with the Fifth Circuit (*Hamker v. Diamond Shamrock*) that section 505 does not extend to purely past violations. 807 F.2d at 1092-94. The First Circuit also held, however, that section 505 confers jurisdiction in cases of likely continuing violations that require injunctive relief, and added that even though injunctive relief may later be denied (because violations had abated), penalties could be imposed where jurisdiction attached based on good faith allegations of the need for an injunction. *Id.* at 1094. The First Circuit described its interpretation as somewhat liberal, but necessary because "even a persistent violator may, temporarily, 'clean up his act.'" *See id.* at 1093.

That concern, the persistent violator who is in compliance temporarily, is not implicated in this case, as explained in petitioner's brief (at pp. 19-21, 41-42). Furthermore, the mere good faith allegation of an ongoing or continuing violation of the Clean Water Act is insufficient to support injunctive relief or the imposition of civil penalties. The First Circuit's contrary suggestion is based on the fact that section 505(a) refers to a person who is "*alleged to be* in violation [emphasis sup-

plied]." 807 F.2d at 1093. Congress, however, expressly modeled section 505, including the quoted phrase, after section 304 of the Clean Air Act. Section 304 limits relief to injunctions, which may not be granted merely on the basis of past unlawful actions. *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974). The First Circuit's liberal interpretation of "alleged to be in violation" was not, therefore, Congress' intent when it crafted that language for section 304 or incorporated it into section 505.

Moreover, the First Circuit's analogy between the "alleged to be in violation" proviso and the amount in controversy in diversity cases is misplaced. The rationale underlying the amount in controversy rule is that a preliminary jurisdictional determination regarding damages should not deny the plaintiff in a diversity case a federal court trial of its claim. *Deutsch v. Hewes Street Realty Corp.*, 359 F.2d 96, 99 (2d Cir. 1966). That rationale does not apply to a suit under section 505 and is not justification for conferring jurisdiction based on a party's pleading.

In any event, if section 505's "in violation" prerequisite can be satisfied by a good faith allegation that continuing violations are likely, such allegations, and the inquiry on which they are based, must be evaluated against an objective standard. That standard must recognize section 505's fundamental purpose—abatement of ongoing violations, rather than imposition of civil penalties (and awards of attorneys' fees) as punishment for "matters over and apparently done with." *Pawtuxet Cove*, 807 F.2d at 1093; *Hamker v. Diamond Shamrock*, 756 F.2d at 396. *See* also Fed. R. Civ. P. 11.[7]

---

[7] The plaintiff's inquiry should not be limited to a review of the periodic (quarterly) monitoring reports required under § 308 of the Act, *see* n.1, *supra*, which may not reflect current compliance status. Rather, the citizen plaintiff must inform itself regarding the defendant's compliance history, recent improvements in wastewater treatment facilities and compliance status up to commencement of the suit. As *Pawtuxet Cove* suggests, 807 F.2d at 1094, in evaluat-

Furthermore, many industrial facilities have several discharge points and at each discharge a number of regulated parameters. *See* n.1, *supra*. An allegation of continuing violations based on recent noncompliance with one of those parameters should not allow a plaintiff to revive past, previously abated noncompliance of unrelated parameters. *Sierra Club v. Kerr-McGee Corp.*, 23 Env't Rep. Cas. (BNA) 1685, 1690 (W.D. La. 1985). Put another way, a series of temperature violations during the winter of 1987 does not allow a citizen to resurrect unrelated violations in 1983 which had previously abated. To hold otherwise would be inconsistent with the role of citizen suits, which may be brought to address only specific violations and conduct indicative of continuing or renewed violations justifying an injunction. *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985); *Pawtuxet Cove*, 807 F.2d at 1093. This view is also consistent with section 309(d) of the Act which subjects each separate violation to the statutory maximum penalty of $25,000 per day. *See* § 313 of the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7, 45.

In short, a citizen suit cannot revive previously abated violations. That is because section 505's object, like the policy of the Clean Water Act, is achieving compliance and section 505 looks to the future rather than to matters over and done with.

---

ing a plaintiff's allegations the district court should consider, among other things, the willfulness of violations, the sincerity of the defendant's assurances against future violations, and the isolated or recurrent nature of the violations (isolated NPDES violations are expected at any facility, *Marathon Oil Co. v. Environmental Protection Agency*, 564 F.2d 1253, 1272-73 (9th Cir. 1977)).

The criteria outlined above do not impose an undue burden on the plaintiff. In response to the standardized letter that environmental organizations frequently use to give the sixty days notice required by § 505(b)(1)(A) the would-be defendant quite often provides considerable information, such as that identified above, regarding compliance status.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

SCOTT M. DUBOFF *
MCNEILL WATKINS II
JOHN P. PROCTOR
BISHOP, LIBERMAN, COOK,
PURCELL & REYNOLDS
1200 Seventeenth St., N.W.
Washington, D.C. 20036
Phone: (202) 857-9800
Counsel for *Amici Curiae*

Of Counsel:

JOHN R. JENCHURA
Consolidated Rail Corporation
1138 Six Penn Center Plaza
Philadelphia, PA 19103
Counsel for Consolidated Rail Corporation

PHILLIP CONTRERAS
Ferro Corporation
One Erieview Plaza
Cleveland, Ohio 44114
Counsel for Ferro Corporation

RICHARD S. COHEN
Jersey Central Power & Light Company
Box 1279R
Morristown, New Jersey 07960
Counsel for Jersey Central Power & Light Company

JACK M. ARNOLD
McDermott Incorporated
1010 Common St., Suite 2745
New Orleans, LA 70112
Counsel for McDermott Incorporated

JAMES E. BAINE
Murphy Oil USA, Inc.
Murphy Building
200 Peach Street
El Dorado, Arkansas 71730
Counsel for Murphy Oil USA, Inc.

TIMOTHY N. ATHERTON
Pennsylvania Electric Company
1001 Broad Street
Johnstown, PA 15907
Counsel for Pennsylvania Electric Company

NATHAN M. EDELSTEIN
EDELSTEIN & BERNSTEIN
3131 Princeton Pike
Lawrenceville, NJ 08648
Counsel for Powell Duffryn Terminals, Inc.

JOSE A. BERLANGA
Shell Oil Company
P.O. Box 2463
Houston, Texas 77001
Counsel for Shell Oil Company

GRANT VAN HORNE
112 South Cedar Street
Auburn, Indiana 46706
Counsel for Universal Tool & Stamping Co., Inc.

* Counsel of Record